Nos. 03-1164 & 03-1165

In The
Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, *ET AL.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,

Respondents.

NEBRASKA CATTLEMEN, INC., *ET AL.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ROSE ACRE FARMS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST

Rose Acre Farms, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for the petitioners, Ann Veneman, Secretary, United States Department of Agriculture, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones, has been obtained. The consent of the attorneys for the respondents, Livestock Marketing Association, *et al.*, was requested but refused.

The interest of Rose Acre Farms, Inc. in these cases arises from the fact that it is the nation's second largest egg producer and the American egg industry is subject to statutes and regulations which are similar to those at issue in these cases. 7 U.S.C. §§2701, *et seq.*; implemented by the Egg Research and Promotion Order appearing at 7 C.F.R. §§1250, *et seq.* Rose Acre Farms, Inc. does business throughout the U.S. and paid in excess of $1.2 million dollars in assessments during its last fiscal year which were used by the American Egg Board to fund generic egg advertising with which Rose Acres disagrees. "The Incredible, Edible Egg" campaign is one example. The American Egg Board spent at least 57% of its revenues of $19.993 million dollars in the 2003 calendar year on advertising and promotional activities.

Rose Acre Farms, Inc. produces specialty eggs which have enhanced nutritional value due to the use of special chicken feeds and also produces cage free eggs, neither of which types of eggs are advertised by the American Egg Board. Rose Acre Farms, Inc. is also participating in the United Egg Producers' Animal Care Certified Program which certifies that chickens producing eggs are treated in a humane manner. This program includes minimum standards for cage space, air quality, molting practices, and beak

trimming practices. The generic advertising engaged in by the American Egg Board promotes the consumption of eggs which do not meet these high quality standards. It conveys a message that eggs are a generic product that bear no distinction based on where and how they are produced.

Maintenance of the Animal Care Certified Program quality standards increases the cost of producing eggs. Therefore, generic advertising which fails to differentiate between eggs produced by Animal Care Certified Program participants and non-participants has the effect of imposing a competitive disadvantage on program participants. Thus, generic advertising by the American Egg Board has the added negative effect of reducing or eliminating any incentive on the part of egg producers to participate in the Animal Care Certified Program which is intended to improve the conditions under which chickens producing eggs live.

The American Egg Board generic advertising also promotes the consumption of eggs produced outside the U.S. with which Rose Acre Farms, Inc. disagrees.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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SUMMARY OF THE ARGUMENT[1]

I. THE BEEF ACT VIOLATES THE FIRST AMENDMENT BECAUSE IT COMPELS CATTLE PRODUCERS AND IMPORTERS TO PAY ASSESSMENTS TO FUND GENERIC ADVERTISING WITH WHICH THEY DISAGREE

"Beef. It's What's For Dinner." is a message intended to promote the beef industry throughout the U.S. However, this message is anathema to some beef producers who object to it because it promotes the consumption of beef produced outside the U.S. It is objectionable to other beef producers because it lumps all beef producers together without regard to their method of production. This case presents the question of whether a beef industry trade group operated under the limited supervision of the U.S. Department of Agriculture can compel dissenting beef producers to contribute to generic advertising with which they disagree.

The Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.* and its accompanying regulations set up organizations composed of private individuals from the beef industry whose purpose is to promote the industry. The Secretary of Agriculture appoints members

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[1] Ann Veneman, Secretary, United States Department of Agriculture, Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones, have consented to the filing of this brief. Letters of consent have been filed separately with the Clerk of the Court.

The consent of the respondents, Livestock Marketing Association, *et al.*, was requested but refused.

This brief was authored in its entirety by counsel for the *Amicus*. No person or entity, other than the *Amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

to the Beef Board, but they must be industry representatives generally nominated by eligible state beef councils. The Beef Act requires beef producers and importers to pay a $1.00 per head assessment for each head of cattle sold to fund promotional activities, primarily generic advertising. The Beef Promotion Operating Committee (Committee) has the responsibility to develop plans and projects for this promotional activity. The Secretary appoints ten of twenty members of the Committee, who must be members of the Beef Board, i.e., industry representatives. The remaining ten members of the Committee are producers elected by a federation that includes as its members qualified state beef councils, again industry representatives.

The Secretary does have authority to remove members of the Beef Board, approve budgets, and approve specific advertising campaigns, but rarely vetoes a proposed advertising campaign. The principal object of the Beef Program is the generic commercial speech that it funds. At least one half of the assessments paid to the Beef Board are used for advertising. Certain producers object to paying the assessments because the generic advertising it funds promotes beef consumption in general, which includes the consumption of beef produced outside the U.S. Some producers object to paying for the advertising because it does not differentiate among beef products.

The Committee is an organization composed of private individuals representing one segment of the population with certain common interests. The commercial speech that it funds is compelled private speech, not government speech. Not all government-facilitated speech is government speech. The Secretary's supervisory responsibilities are not sufficient to transform the beef industry's self help program into government speech. As such, it is subject to First Amendment analysis. The Beef Program violates the

First Amendment because it impinges on the producers' free speech and association rights.

II. COMPELLED GENERIC ADVERTISING UNDER THE BEEF ACT IS NOT A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

Advertising is commercial speech which is entitled to less First Amendment protection than other constitutionally guaranteed expression. When a private party engages in advertising, the government is free to regulate it to prevent it from being false, deceptive, or misleading. This includes a right to compel an advertiser to make certain disclosures to prevent its commercial speech from being false, deceptive, or misleading. No one is claiming that voluntary advertising placed by beef producers is false, deceptive, or misleading. Therefore, the compelled generic advertising done by the Committee cannot be upheld as a form of compelled advertising disclosure under applicable law.

It is not appropriate to apply the *Central Hudson* test for restrictions on speech to analyze the First Amendment issues presented by this case. The *Central Hudson* test applies to cases involving restrictions on speech. The Beef Program's assessments do not restrict speech, they compel producers to pay for private speech with which they disagree.

III. GENERIC ADVERTISING UNDER THE BEEF ACT CANNOT SURVIVE FIRST AMENDMENT SCRUTINY AS PART OF A BROAD REGULATORY SCHEME

The Court has not upheld compelled subsidies for speech in the context of programs where the principal

object of the program is the speech that it funds. An overriding associational purpose independent from the speech itself may permit compelled speech subsidies. The Court has found such overriding associational purposes to permit compelled speech in cases involving union shops, state-mandated integrated bar associations, and heavily regulated agricultural cooperatives.

The beef industry is not a heavily regulated agricultural cooperative. While it is subject to certain government regulations, beef producers are not bound together and are not required to market their products as members of an agricultural cooperative according to cooperative rules. They remain free to make independent marketing decisions. There are no marketing orders that regulate how beef may be produced and sold. The beef producers remain free to engage in independent market activity. As such, some beef producers should not be permitted, with the government's help, to compel dissenting producers to pay for generic advertising with which they disagree.

ARGUMENT

I. THE BEEF ACT VIOLATES THE FIRST AMENDMENT BECAUSE IT COMPELS CATTLE PRODUCERS AND IMPORTERS TO PAY ASSESSMENTS TO FUND GENERIC ADVERTISING WITH WHICH THEY DISAGREE

Beef may be what's for dinner, but not all beef producers wish to serve the same type of beef or associate with each other in the generic promotion of beef. The beef industry in the U.S. is a large and diverse industry.

Thirty-one states have at least 10,000 beef cattle operations. *See* pp. 5-6, Brief of Texas, 32 Other States and Puerto Rico as *Amici Curiae* in Support of Petitioners. Congress passed the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.*, to promote the beef industry due to its importance to the U.S. economy. The Beef Act and the order implementing it creates a structure of beef industry organizations whose principal object is the funding and expression of the generic commercial speech which is the subject of this case. All beef producers and importers are compelled to pay the assessments provided for by the Beef Program to fund this generic commercial speech. Certain industry representatives serve on the various state beef councils and the Beef Operating Committee and are empowered to spend the $82.7 million dollars generated by the beef checkoff program in 2003 to promote the industry. *See* p. 7, Brief of Federal Petitioners. At the federal level, twenty beef industry representatives on the Committee are charged with developing and overseeing the Beef Board's promotion program subject to the Secretary of Agriculture's "veto" power.

The Beef Board is composed of private individuals who are appointed by the Secretary of Agriculture. 7 U.S.C. §2904(1). Members of the Beef Board must be cattle producers and importers appointed by the Secretary from nominations submitted by eligible state beef councils, or if there is none for a particular state, in a different manner. Importers are nominated in a manner determined by the Secretary. *Id.* The Secretary does not enjoy plenary discretion to appoint anyone whom he or she pleases to the Beef Board. The number of Beef Board representatives is determined by the inventory of cattle in a particular unit. *Id.* The composition of the Beef Board has been carefully

controlled to ensure that it represents private industry interests in proportion to the inventory of cattle in a particular geographic unit. The Beef Act has been described as a "self help" measure that enables the beef industry to employ its own resources and devise its own strategies to increase beef sales, while avoiding the intrusiveness of government regulation. The Beef Promotion and Research Program receives no direct funding from the federal government. General tax revenues are not used to fund the program. *United States v. Frame,* 885 F.2d 1119, 1121 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

The Beef Act requires beef producers and importers to pay an assessment of $1.00 per head for each head of cattle sold to fund promotional activities, primarily generic advertising. *Livestock Marketing Ass'n, et al. v. U.S. Dept. of Agric., et al.,* 207 F. Supp.2d 992, 997-998 (D.S.D. 2002) (*LMA II*). At least 50% of the assessments imposed on cattle producers and importers paid to the Beef Board are used for advertising. *Id.* at 997-998, 1002. The District Court found that the principal object of the beef checkoff program is the commercial speech that it funds. *Id.* at 997-998, 1002. At least some of the beef producers disagree with the type of advertising done by the Beef Board as it implies that beef is all the same and promotes all beef products, rather than only American beef products. *Id.* at 996-997. Forty-five states have established qualified state beef councils which may retain up to half of the checkoff assessments they collect to fund in-state promotion and other programs. 7 C.F.R. §1260.172; Trial Tr. 206-07, 316. Congress has granted beef councils very broad powers to promote the image and desirability of beef and beef products. 7 U.S.C. §2902(13), (14). Thus, an organization composed of private individuals representing private

interests receives funding compelled by the government and uses that funding to promote beef products in a manner which the private individuals determine. Individual producers and importers have no right to control the content of the advertising, nor may they opt out of supporting it, even though the generic advertising may, in their view, actually injure rather than promote their particular operations.

Even speech which is clearly government speech coming directly from the government and whose content is explicitly dictated by the government can violate the First Amendment when individual citizens are compelled to become a courier for it. *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). This right was first announced in *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624 (1943) "in which the Court held that school children with religious objections to the flag saluting ceremony have the constitutional right to be free from compulsion . . . to declare a belief." [internal citations omitted] *Frame,* p. 1130.

The First Amendment protects not only the right of freedom of expressive association, but also a right not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 623 (1984). Likewise, the First Amendment protects not only the right to speak, but also the right to "refrain from speaking". *Wooley, supra.* "Compelled contributions to private groups engaging in first amendment activities have been held to implicate these two aspects of first amendment liberty". *Frame, supra,* p. 1130.

"The reason for permitting the government to compel the payment of taxes and to spend money is that the government is the representative of the people. The same

cannot be said of a union, which is representative only of one segment of the population, with certain common interests." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 259 (1977), Justice Powell concurring. The Beef Board is an entity representative of one segment of the population with common interests, rather than the representative of the people, therefore its speech is private speech and the generic advertising done with beef checkoff funds is compelled private speech, not government speech.

"First Amendment values are at serious risk if the government can compel a . . . discrete group of citizens, to pay special subsidies for speech on the side that it favors . . ." *United States v. United Foods*, 533 U.S. 405, 411 (2001). *United Foods* did not consider the question of whether advertising funded by mandatory assessments similar to those at issue in this case is government speech immune from the scrutiny applied to other compelled speech because that argument was not raised in the Court of Appeals. *Id.* at 416. That issue is now squarely before this Court.

The Third, Fifth, Sixth, and Eighth Circuits have addressed the application of the government speech doctrine to generic marketing programs and concluded that this type of producer-funded marketing is not government speech. *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 429 fn. 13 (5th Cir. 2004). The Fifth Circuit has explained that, "The fact that the government has an interest in facilitating private speech does not convert that speech into a governmental message." It rejected the government's argument that alligator marketing is government speech because the applicable council's governing statutes lay out specific goals and articulate the state's interest in the promotion of the alligator industry. *Id.* at

430 fn. 14. The government's argument invites the conclusion that all commercial advertising could be considered government speech and funding for it compelled by the government through a plethora of industry trade organizations as the government could be said to have an interest in all forms of economic activity which create jobs and outlets for the consumption of products produced in the U.S. or by U.S.-based companies.

"Not all government-facilitated speech is government speech. The government speech doctrine does not apply if a program is 'designed to facilitate private speech, not to promote a governmental message.' *Velazquez,* 531 U.S. at 542, 121 S.Ct. 1043". *Pelts & Skins, LLC v. Landreneau,* 365 F.3d 423, 429 (5th Cir. 2004).

The Beef Board and the individual state beef councils are not governmental entities whose activities are protected by the government speech doctrine. The following facts distinguish a private entity from a government entity for the purpose of determining whether an organization's speech is private speech or government speech:

1. Private funding from dues levied on members;
2. Membership restricted to persons engaged in a certain profession who are required to join the organization;
3. Regulatory functions reserved to a governmental entity.

Keller v. State Bar of California, 496 U.S. 1, 11-13 (1990).

The Beef Board meets all of the above tests for a private entity:

1. Private funding from assessments levied on the sale and importation of beef;

2. Membership is composed of beef producers and importers;

3. The enforcement of the Beef Program is reserved to the Secretary of Agriculture and jurisdiction is vested in the district courts of the United States to enforce, and to prevent and restrain a person from violating, an order or regulation made or issued under it. 7 U.S.C. §2908.

The powers of the Beef Board are limited to those set forth in 7 U.S.C. §2904(2). It is the Beef Promotion Operating Committee provided for by 7 U.S.C. §2904(4)(A) which has the responsibility to "develop plans or projects of promotion and advertising, research, consumer information, and industry information which shall be paid for with assessments collected by the Board." 7 U.S.C. §2904(4)(C). The Operating Committee is composed of ten members elected from the membership of the Beef Board and ten producers elected by a federation that includes as its members the qualified state beef councils. 7 U.S.C. §2904(4)(A). Thus, a majority of the members of the Operating Committee are not appointed by the Secretary of Agriculture and all of the members of the Operating Committee are beef industry producers and/or importers.

It has been held, however, that advertising funded under the Beef Act is government speech, and, therefore, not subject to First Amendment analysis. *Charter v. USDA*, 230 F. Supp. 1121 (D.C. Mont. 2002). *Charter* held that through the Beef Act, Congress and the USDA use private speakers to disseminate a government message which is a recognized form of government speech. *Id.* at

1138. This result was reached primarily in reliance on *Rust v. Sullivan,* 500 U.S. 173 (1991); and *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000). *Rust* is easily distinguishable from this case as it involved a challenge to the funding of family planning programs. Congress and the Department of Health and Human Services created a program that funded family planning but required that funds not be distributed to programs where abortion was used as a method of family planning. Those challenging the legislation as unconstitutional argued that withholding funding from programs that discussed abortion was unconstitutional because it discriminated against a particular viewpoint. The Court held that choosing not to fund speech does not constitute suppression of speech and that a decision not to fund the exercise of a fundamental right does not infringe that right. *Rust v. Sullivan,* at 772. The Court noted that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . ." *Id.*

This case does not involve a claim that the Beef Board, or the Secretary, should fund alternative types of beef advertising expressing different viewpoints. Therefore, the *Rust* analysis does not fit the facts of this case.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) is a school prayer Establishment Clause case in which a high school adopted a policy that permitted, but did not require, a student-led prayer before home football games. The prayer or invocation was authorized by a government policy, and took place on government property at government sponsored events. The school did not create an open forum for the student body at the games, but allowed only one student to give the invocation for the entire season and created specific regulations that defined the content

and topic of the message. The Court held that the invocation was government speech endorsing religion which the Establishment Clause forbids. *Id.* at 2275. The Court explained that the delivery of a school sponsored religious message over the school's public address system by a speaker representing the student body under the supervision of school faculty and pursuant to a school policy that encourages public prayer is not properly characterized as private speech. *Id.* at 2279.

Establishment Clause cases have developed their own particular analytical rules which are not as useful in analyzing compelled speech cases such as this one. However, it should be noted that the generic advertising at issue in this case is not targeted for display on government property at government sponsored events to a "captive audience" of attendees. The advertising appears in a wide variety of private commercial media where it competes with other food advertising seeking to influence consumers' food choices and spending habits.

The Sixth Circuit has held that compelled generic advertising for pork products under the Pork Promotion, Research and Consumer Information Act, 7 U.S.C. §§4801 *et seq.* (the "Pork Act"), is private speech due to the pork industry's extensive control over the promotional activities funded by the pork checkoff program. *Michigan Pork Producers Ass'n, Inc. v. Veneman,* 348 F.3d 157, 161 (6th Cir. 2003). The Sixth Circuit held the following facts supported its conclusion:

1. The primary purpose of the Pork Act is to strengthen the pork industry's market position and increase domestic markets for pork products;

2. The funding for the generic advertising does not come from general tax revenues; and,

3. The government exercises only limited oversight over the programs. *Id.*, 161-162.

The generic advertising purchased with beef checkoff assessments is private speech for the same reasons:

1. The primary purpose of the Beef Act is to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. 7 U.S.C. §2901(b).

2. The funding for the generic advertising does not come from general tax revenues, but from assessments on all cattle sold and imported into the U.S. *Id.*

3. The government exercises only limited oversight over the programs.[2]

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[2] The following facts were found to have established only limited government oversight of the Pork Program in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157, 162 (6th Cir. 2003):

> "Only one USDA staff member is responsible for overseeing all of the duties relating to the Pork Checkoff Program, including attending all meetings of the Pork Board and reviewing all advertisements and communications it develops. The government itself does not propose or draft any of the advertisements. . . . The Pork Board itself is comprised only of private pork producers, appointed by the Secretary based on nominations made by private state pork producers associations – which themselves are run entirely by industry officials."

Further details about the organizational structure and operations of the Pork Program are set forth in the District Court opinion in the case:

> "Under the Pork Act, the Pork Board's planning and operations are to be overseen and approved by the Secretary of

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The Fifth Circuit has identified three factors which it held establish that compelled generic alligator advertising by the Louisiana Fur and Alligator Advisory Council (the "Council") is government-facilitated private speech of fur and alligator harvesters:

1. Funds used by the Council for generic advertising do not come from general state revenues, but from fees levied on harvesters of furs and alligators.

2. An organization that represents private interests, the Council, is responsible for the generic marketing campaign.

3. The composition of the council demonstrates that it represents primarily private interests.[3]

Agriculture. 7 U.S.C. §4808(b)(1). The Secretary also has administrative authority to fire Board members when continued service would be 'detrimental' to the purposes of the Pork Act. 7 C.F.R. §1230.55. . . . Pork Board members are selected on a representational basis from nominees made by the National Pork Producers Delegate Body, 7 U.S.C. §§4806(g) and 4808(a). . . . [T]he Department of Agriculture regularly reviews the advertising and other project budgets of the Pork Board. . . . Similarly, the Department reviews each Pork Act advertisement before airing. . . . This kind of review results in amendments of only approximately four percent of the ads shown to the Department." *Michigan Pork Producers Ass'n, Inc., et al. v. Campaign for Family Farmers, et al.*, 229 F. Supp.2d 772, 786-787 (W.D. Mich. 2002).

The Beef Program operates in a virtually identical manner. *See* pp. 4-7, Brief for the Federal Petitioners.

[3] The Louisiana Fur and Alligator Council is a government creation. The Louisiana Secretary of Agriculture (or his designate) serves *ex officio* along with eleven other appointed members. The

(Continued on following page)

Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 429-430 (5th Cir. 2004).

The same three considerations compel the conclusion that Beef Program compelled generic advertising is government-facilitated private speech:

1. Funds used by the Beef Operating Committee for generic advertising do not come from general government revenues, but from assessments imposed on beef producers and importers engaged in the sale and importation of beef and beef products. 7 U.S.C. §2901(b).

2. An organization that represents private interests, the Beef Operating Committee, is responsible for the generic marketing campaign.

3. The composition of the Beef Operating Committee demonstrates that it represents primarily private interests.[4]

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speaker of the House and the president of the Senate each appoint one member. The remaining nine members are appointed by the Secretary, however, they must represent "a cross section of trappers, alligator hunters, coastal landowners, and alligator farmers". Two of the nine members must represent a private organization, the Louisiana Alligator Farmers and Ranchers Association. The Secretary appoints the remaining seven members based on nominations from the Louisiana Trappers and Alligator Hunters Association. *Pelts & Skins, LLC v. Landreneau,* 365 F.3d 423, 430 (5th Cir. 2004).

[4] The Beef Promotion Operating Committee consists of ten members of the Beef Board and ten producers elected by a federation that includes as members the qualified state beef councils. The producers elected by the federation must be certified by the Secretary of Agriculture as producers that are directors of a qualified state beef council. 7 U.S.C. §2904(4)(A). The Beef Board from which ten members of the Beef Promotion Operating Committee must be selected consists

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The Third Circuit has twice held that generic advertising financed with assessments imposed on agricultural producers is not government speech: *Cochran v. Veneman, et al.*, 359 F.3d 263, 268 (3rd Cir. 2004); *United States v. Frame*, 885 F.2d 1119, 1132 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); however, it has modified its analysis of the issues presented by the cases as a result of *United Foods* and *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

The *Frame* court did not have the benefit of the guidance of either *United Foods* or *Glickman*, but did determine that the Beef Act implicated the producers' First Amendment free speech and association rights. However, the *Frame* court ultimately upheld the Beef Act, applying a *Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) analysis to the free speech claim and a *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) analysis to the association claim. *Frame*, pp. 1133-1134. The *Frame* court's strictest scrutiny was brought to bear on the association claim. The court stated that it would sustain the constitutionality of the Beef Act only if the government could demonstrate that it was adopted to serve compelling state interests that are ideologically neutral and that cannot be achieved

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of cattle producers and importers nominated by eligible state organizations and importers. 7 U.S.C. §2904(1). Thus, while the Secretary of Agriculture retains authority to appoint members of the Beef Board, her possible selections are limited to beef industry representatives nominated by private parties. Likewise, ten members of the Beef Promotion Operating Committee, one half of its membership, are elected by a private federation. Clearly all of the members of the Beef Board and the Beef Promotion Operating Committee represent beef industry private interests.

through means significantly less restrictive of free speech or associational freedoms. The court concluded that the importance of the government's interest justified the slight incursion on Frame's associational and free speech rights. *Frame,* p. 1134.

The Third Circuit recognized that the *Frame* analysis had been abrogated by *United Foods* and *Glickman* in *Cochran v. Veneman, et al.,* 359 F.3d 263, 274 (3rd Cir. 2004), *cert. pending*. *Cochran* involved a challenge to The Diary Promotion Stabilization Act of 1983, 7 U.S.C. §§4501 *et seq.* and its accompanying compelled assessments for advertising. Under the Dairy Act, producers of fluid milk are assessed .15 per hundredweight of milk for commercial use. *Cochran,* at 266, fn. 1. The court held that the Dairy Act violated the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. *Id.* at 268. In reaching this conclusion, the court held that the generic advertising purchased with compelled assessments under the Dairy Act is private speech. *Id.* at 274. It reached this result in reliance on the Beef Act analysis contained in the *Frame* case which held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to them. *Id.* at 273-274. The court quoted from *Frame:* "the Secretary's extensive supervision . . . does not transform this self-help program for the beef industry into 'government speech'" and explained that "The Cattlemen's Board seems to be an entity 'representative of one segment of the population, with certain common interests'" and went on to point out that the members of the Beef Board and Operating Committee are all private individuals involved in the beef industry. *Id.* at 274 [internal citations

omitted]. Finding that the government's role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, the court held that the Secretary's supervisory responsibilities under the Dairy Program are not sufficient to transform the dairy industry's self-help program into government speech. *Id.*

In re Washington State Apple Advertising Comm'n, 257 F. Supp.2d 1290, 1296-1298 (E.D. Wash. 2003) held that the Washington State Apple Commission's promotional advertising funded by assessments imposed on each box of apples packed for the fresh market is not government speech.[5] The Court applied the *United Foods* analysis to the Washington apple industry and found that the Commission is not part of a comprehensive regulatory structure collectivizing the market. *Id.* at 1302.

II. COMPELLED GENERIC ADVERTISING UNDER THE BEEF ACT IS NOT A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

In *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001), the Court refused to consider whether or not the government's interest in compelled generic advertising under the Mushroom Promotion Research and Consumer Information Act, 7 U.S.C. §§6101 *et seq.*, could be

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[5] The Washington State Apple Commission's structure was created by an act of the state legislature. The Commission has been in existence since 1937 as a creature of state law and does not have the same similarities to the Beef Program that the Pork Program and the Mushroom Program do. In fact, neither the State of Washington nor any political subdivision has authority to edit, change, or censor the Commission's speech. *In re Washington State Apple Advertising Comm'n*, 257 F. Supp.2d 1290, 1294-1297 (E.D. Wash. 2003).

considered substantial for purposes of applying the test articulated in *Central Hudson Gas and Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) to analyze government imposed restrictions on commercial speech because the government did not rely upon *Central Hudson* to challenge the Court of Appeals decision in that case. *United Foods,* at 410.

Commercial speech is expression related solely to the economic interests of the speaker and its audience. *Central Hudson,* at 561. It not only serves the economic interests of the speaker, "but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-562. Commercial speech is accorded lesser protection under the Constitution than other constitutionally guaranteed expression. The protection available for particular commercial speech turns on the nature of the expression and of the governmental interests served by its regulation. *Id.* at 563.

The Beef Program's compelled assessments do not restrict the beef producers' speech at all, they compel private speech. Because the Program's assessments do not restrict speech, it is inappropriate to apply the *Central Hudson* test for restrictions on speech to analyze the First Amendment issue in this case. *In re Washington State Apple Advertising Comm'n,* 257 F. Supp.2d 1290, 1303 (E.D. Wash. 2003).

When a private party chooses to engage in commercial speech, i.e., advertising, the government is free to regulate it to prevent it from being false, deceptive, or misleading. This right to regulate includes a right to compel an advertiser to make certain disclosures to prevent its commercial speech from being false, deceptive or misleading. *Zauderer*

v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985). Such disclosure requirements must be reasonably related to the government's interest in preventing deception of consumers. *Id.* at 651.

The *Central Hudson* and *Zauderer* analyses are inapplicable to this case because there is no suggestion or evidence that the compelled generic advertising at issue is necessary to prevent voluntary advertising placed by the beef producers from being misleading. *United Foods,* at 416; *In re Washington State Apple Advertising Comm'n,* at 1303. Since no one claims that the beef producers are privately engaged in false, deceptive, or misleading advertising, the government has no right to compel the generic advertising in question to prevent consumer deception.

III. GENERIC ADVERTISING UNDER THE BEEF ACT CANNOT SURVIVE FIRST AMENDMENT SCRUTINY AS PART OF A BROAD REGULATORY SCHEME

Beef producers are not bound together and required to market their products as members of a large agricultural cooperative according to cooperative rules. There is nothing preventing individual beef producers and importers from making their own marketing decisions. Beyond the collection and disbursement of beef checkoff funds which are primarily used for advertising, there are no marketing orders that regulate how beef may be produced and sold. These crucial distinctions between the beef industry and the California fruit farmers described in *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457 (1997) compel a different outcome in this case.

In *Glickman,* California fruit farmers were subject to a series of agricultural orders promulgated by the USDA. *Id.* at 460. The orders exempted the fruit farmers from antitrust laws, collectivized fruit sales, set prices, set rules for marketing, and compelled fruit farmers to contribute to generic advertising. *Id.* at 469. In analyzing the constitutionality of the compelled contributions for generic advertising, the Court first reviewed the operation of the agricultural orders in their entirety and concluded that the orders reflected a policy of displacing unrestrained competition with government supervised cooperative marketing. *Id.* at 475. The Court decided that to avoid First Amendment scrutiny, an agricultural marketing program must compel speech that is: 1) unquestionably germane to the purposes of the marketing orders that collectivized the industry; and 2) non-ideological. *Id.* at 473. This analysis has been described as a determination that the compelled advertising assessments are a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords to other policy judgments made by Congress, rather than speech restrictions subject to First Amendment analysis. *In re Washington State Apple Advertising Comm'n,* 257 F. Supp.2d 1290, 1299 (E.D. Wash. 2003).

In contrast, the Court struck down compelled assessments for generic advertising imposed on mushroom handlers on First Amendment grounds in *United States v. United Foods, Inc.,* 533 U.S. 405, 411 (2001). The Court distinguished *Glickman* from the facts presented by the *United Foods* challenge to compelled assessments charged to promote generic advertising under the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§6101 *et seq.*, by reviewing the entire regulatory

program in order to resolve the case. The Court noted that in *Glickman,* the California tree fruits were marketed pursuant to detailed marketing orders that had displaced many aspects of independent business activity. *United Foods,* at 412. The tree fruit market in *Glickman* was described as "characterized by collective action rather than the aggregate consequences of independent competitive choices." *Id.* [internal citations omitted]. The *United Foods* opinion explained that the *Glickman* opinion and analysis "proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules." *Id.*

The Court distinguished the mushroom handlers in *United Foods* from the California tree fruit growers in *Glickman* as follows: "Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions." *Id.* As the mushroom growers were not required by statute to market their products according to cooperative rules as part of a valid scheme of economic regulation, the Court applied a First Amendment compelled speech analysis to strike down the assessment program. *Id.* at 410-411.

More than a quarter century ago, the Court held that commercial speech, usually defined as speech that proposes a commercial transaction, is entitled to First Amendment protection. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976). The *United Foods* opinion recognized the continuing vitality of this doctrine. *United Foods,* at 409.

The Court noted that it has not upheld compelled subsidies for speech in the context of programs where the principal object of the program is speech itself. *Id.* at 415.

The Court stated that it is only an overriding associational purpose independent from the speech itself which allows any compelled subsidy for speech in the first place and that such an overriding associational purpose did not exist in the case of the mushroom handlers. *Id.* at 413-416.

The following required associations have been found to have overriding associational purposes independent from speech which have been held sufficient to support some form of compelled speech: union shop arrangements, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); state-mandated integrated bar associations, *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) and heavily regulated agricultural cooperatives, *Glickman, supra.* Even where the Court has upheld compelled speech subsidies imposed by government required associations, objecting members are not required to provide speech subsidies for matters not germane to the larger regulatory purposes which justified the required association. *United Foods,* at 414.

If no overriding associational purpose independent from speech exists to justify the required association of agricultural producers, then there is no basis on which to compel speech subsidies and they must be struck down as violative of the First Amendment. *Id.* at 415-416.

The district court in this case made the following findings which supported its ultimate conclusion that the beef checkoff is, in all material respects, identical to the mushroom checkoff:

1. The principal object of the beef checkoff program is the commercial speech itself;

2. Beef producers and sellers make all marketing decisions;

3. Beef is not marketed pursuant to some statutory scheme requiring an antitrust exemption;

4. The beef assessments are not germane to a larger regulatory purpose;

5. Beef producers and sellers are not regulated to the extent that the California tree fruit industry is.

LMA II at 1002.

Since no overriding associational purpose independent from speech exists to justify the required association of beef producers and importers, there is no basis on which to compel speech subsidies imposed by the beef checkoff program and they must be struck down as violative of the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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